

9/21/16



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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CYNTHIA ANDERSON-BARKER,

Petitioner,

vs.

CITY OF LOS ANGELES,

Respondent.

CASE NO. BS 159845

Assigned to the Hon. Carolyn O'Donnell
Judge of the Superior Court
Department 86

**RESPONDENT'S REQUEST FOR JUDICIAL
NOTICE IN OPPOSITION TO PETITION
FOR WRIT OF MANDATE**

Date: October 19, 2016

Time: 9:30 a.m.

Dept: 86

Petition for Writ of Mandate filed January 27, 2016

**RESPONDENT'S REQUEST FOR JUDICIAL NOTICE IN OPPOSITION
TO PETITION FOR WRIT OF MANDATE**

9/19/16

1 Respondent CITY OF LOS ANGELES respectfully requests this court to take judicial notice of
2 the tentative decision adopted by the court as its Order Denying Petition for Writ of Mandate in Flynn v.
3 City of Los Angeles (October 14, 2014), BS 147850, pursuant to Code of Civil Procedure §452(d).
4

5 DATED: September 19, 2016
6

7 **MICHAEL N. FEUER**, City Attorney
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EXHIBIT A

Anderson-Barker v. City of Los Angeles – BS 159845

Petitioner Colleen Flynn ("Flynn") applies for a writ of mandate directing Respondent City of Los Angeles ("City") to produce records in response to Flynn's CPRA request.

The court has read and considered the moving papers, opposition, and reply, heard oral argument and required supplemental briefing, and renders the following tentative decision.

A. Statement of the Case

Petitioner Flynn commenced this proceeding on March 27, 2014. Flynn seeks a writ of mandate pursuant to the California Public Records Act ("CPRA") (Govt. Code §6250 *et seq.*), directing the City to release public records pursuant to a public records request.

The Petition alleges in pertinent part as follows. On or about March 10, 2014, by way of a letter to Steve Soboroff, President of the Los Angeles Board of Police Commission, and Charlie Beck, Chief of the Los Angeles Police Department ("LAPD"), Petitioner requested that the City provide the disclosures and/or production of all data regarding vehicle seizures recorded in the Vehicle Information Impound Center ("VIIC") database, and all documents scanned into Laserfiche, including documents indexed by log number.

The City, in nearly identical responses dated March 19 and 20, 2014, refused to produce or provide access to the records.

Petitioner seeks to compel production of the requested public records.

B. Governing Law

The CPRA (Govt. Code §6250 *et seq.*) was enacted in 1968 to safeguard the accountability of government to the public. San Gabriel Tribune v. Superior Court, (1983) 143 Cal.App. 762, 771-72. Govt. Code¹ section 6250 declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The CPRA's purpose is to increase freedom of information by giving the public access to information in possession of public agencies. CBS, Inc. v. Block, (1986) 42 Cal. 3d 646, 651. The CPRA was intended to safeguard the accountability of government to the public, and it makes public access to governmental records a fundamental right of citizenship. Wilson v. Superior Court, (1996) 51 Cal.App.4th 1136, 1141. This requires maximum disclosure of the conduct of government operations. California State University Fresno Assn., Inc. v. Superior Court, ("California State University") (2001) 90 Cal.App.4th 810, 823.

The CPRA makes clear that "every person" has a right to inspect any public record. §6253(a). The term "public record" is broadly defined to include "any writing containing information relating to the conduct of the people's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. §6252(e). The inspection may be for any purpose; the requester's motivation is irrelevant. §6257.5. If a record is a public record then the presumption is that it must be disclosed. §§ 6253(a), 6256.

¹All further statutory references are to the Government Code unless expressly stated otherwise.

The agency is required to respond to the request within ten days. §6253(c). The right to inspect is subject to certain exemptions, which are narrowly construed. California State University, supra, 90 Cal.App.4th at 831. The exemptions are found in sections 6254 and 6255. In pertinent part, public records exempt from disclosure include (1) personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy (§6254(c)), and (2) records subject to a “catch-all” exemption where the facts of the particular case demonstrate that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. §6255.

The burden of demonstrating that exemptions apply lies with the governmental entity. §6255. If the agency fails to carry that burden, the requested record must be disclosed. New York Times v. Superior Court, (1990) 218 Cal.App.3d 1579, 1586-87.

A petition for traditional mandamus is appropriate in actions “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station....” CCP §1085. This includes actions to compel compliance with CPRA. §§ 6258, 6259. No administrative record is required for traditional mandamus. The court must uphold the agency’s action unless it is “arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner’s rights.” Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

C. Statement of Facts

For many years, the City has hired privately-owned tow companies to tow and store vehicles at the direction of City personnel, principally LAPD officers. These tow companies, known as OPGs (“Official Police Garages”), perform their services pursuant to the directions spelled out in their respective contracts with the City. There are presently 17 privately-owned OPGs which contract with the City. Although the City contracts separately with each OPG, the contracts are materially identical. Cook Decl., ¶2.

Whenever an LAPD officer needs a vehicle impounded, he or she must notify LAPD Communications, which contacts an OPG. Jones Decl., ¶5. The LAPD officer prepares a CHP 180 form documenting that event. There are seven pages to the CHP 180 form. The officer gives pages three and four to the driver, if he or she is available, and the page seven of the form to the OPG tow truck driver. Jones Decl., ¶5.² LAPD also mails a copy to the vehicle’s registered owner. Cook Decl., ¶6; 4 LAPD Manual §222.50.

The tow company enters certain information about the vehicle seizure into VIIC, a computer data base maintained by OPG-LA.³ Cook Decl., ¶5. OPG-LA uses VIIC to accumulate data from the records of the individual OPGs contracting with the City.

²The City maintains its version of the CHP 180 form in an LAPD investigative file. Jones Decl., ¶10.

³OPG-LA is a separate company whose members are the OPGs who contract with the City. OPG-LA manages the OPGs’ databases and recordkeeping duties to insure that the OPGs satisfy their contractual obligations to the City. Cook Decl., ¶3; Jones Decl., ¶6.

The tow company also scans its version of the CHP 180 form⁴ into Laserfiche, a large document storage company hired by OPG-LA to store OPG-scanned documents. Cook Decl., ¶6; Cook Decl., Ex. B., p.65. OPG-LA has an agreement with Laserfiche for the electronic storage of its member OPGs' records. Jones Decl., ¶8. The documents scanned into Laserfiche include the OPG's scanned CHP 180 forms and the OPG's vehicle impound information. Cook Decl., Ex.B, p.69. Each OPG can access its own Laserfiche records, but not another OPG's records. See Cook Decl., Ex.B, pp. 63-64. The City's Police Commission also can access all Laserfiche records. Cook Decl., Ex.B, pp. 66, 69.

On March 10, 2014, Petitioner Flynn served the City with a CPRA request seeking: (1) all data recorded in the VIIC database; and (2) all documents scanned into Laserfiche regarding vehicle seizures, including but not limited to, documents indexed in Laserfiche by log number.

The City responded on March 19, 2014 stating that the records sought were not City records and in any event they were exempt from disclosure under sections 6254(f), 6254(k), and 6255.

D. Initial Analysis

Petitioner seeks a writ of mandate directing the City to produce the VIIC and Laserfiche records sought in his CPRA request.

Petitioner must establish that the records in question (1) qualify as public records, and (2) are in the City's possession. Consolidated Irrigation District v. Superior Court, ("Consolidated Irrigation") (2012) 205 Cal.App.4th 697, 709.

1. Does the City Constructively Possess the Database Records?

Possession generally denotes custody, control, or dominion, and can be actual or constructive. Batt v. City and County of San Francisco, (2010) 184 Cal.App.4th 163, 172. For purposes of the CPRA, a public agency possesses records either through actual or constructive possession. Consolidated Irrigation, *supra*, 205 Cal.App.4th at 710 (public agency has constructive possession "if it has the right to control the records, either directly or through another person").

Petitioner concludes that the City has constructive possession of the VIIC and Laserfiche data. Mot. at 6-9. Petitioner notes that the City/OPG contracts grant the City with virtually unfettered and unlimited use of the VIIC data and OPG-scanned CHP 180 forms on Laserfiche. The contracts require the OPGs to retain all records generated or kept by the OPGs in performing the agreement, including the VIIC data and scanned CHP 180 forms, in an accessible location. Cook Decl., Ex.D, §14.3(a).⁵ The contracts also require the OPGs to permit City representatives

⁴The OPG's version of the form is materially different than the LAPD copy. Compare Cook Ex. F (LAPD form) with Jones Ex.6 (Laserfiche copies of form).

⁵"The OPG must retain all records generated or kept by the OPG in performance of this Agreement in an accessible location...." *Id.*

to examine and copy the records. *Id.*, §14.3(e).⁶ Petitioner concludes that the City has unlimited access to the VIIC data and the OPG-scanned CHP 180 forms in Laserfiche, and therefore constructively possesses the data.

The City opposes, arguing that does not constructively possess the data in either database because it does not own the records, nor have a right of control over them. *Opp.* at 5-8. The City initially contends that it is like the city in Consolidated Irrigation, which did not have a duty to disclose records it did not possess and to which it had no ownership rights. 205 Cal.App.4th at 709-11. Similarly, the vehicle impound records are maintained and possessed by a private subcontractor (OPG-LA or Laserfiche) hired by the City's independent contractors (OPGs), and the City has no contractual relationship with the private subcontractors. *Jones Decl.*, ¶'s 2, 8.

The court has no difficulty dispensing with this argument. OPG-LA is a document management entity created by the OPGs to manage their databases and perform their recordkeeping. It is not an independent contractor. Rather, OPG-LA is the mere recordkeeping agent for the OPGs' documents with no ownership and little control of those documents. This is even more true of Laserfiche, which electronically stores the OPGs' documents without having any interest in their content.⁷ OPG-LA and Laserfiche have no ownership and no pertinent control over the databases they hold.

Given that the records are the property of the OPGs, the City then argues that it has no rights of ownership nor control over the requested records. It cannot maintain them, modify them, delete them, and does not own them. Therefore, the City does not constructively possess the records. The City concludes that Petitioner is not asking for City records, but rather for private records to which the City has access and made limited use. Without any right of ownership or control over the records, the City does not constructively possess them. *Opp.* at 7.

The City is correct. As it argues, the CPRA grants public access only to records in the possession of public agencies; the law does not compel agencies to retrieve records from private independent contractors. *See Filarksy v. Superior Court*, (2002) 28 Cal.4th 419, 425. The requirement of possession serves to distinguish between records that a public agency merely has access to and uses from records which it owns or controls, with only the latter being subject to public disclosure. *See Consolidated Irrigation, supra*, 205 Cal.App.4th at 709-11.

To be in constructive possession of a record, a public agency must have more than the mere possibility of control over the records. *Id.*, at 711. An agency constructively possesses records only where the agency has an established right of control or dominion over the records; conjecture that the agency could acquire this right is insufficient. Additionally, the mere status of a private independent contractor as an agent of its public agency principal does not mean the public agency has constructive possession of the records. By definition, the independent

⁶"No person shall interfere with, prevent, or refuse to permit concerned law enforcement personnel or representatives of the Board or City to make an examination, inspection or copy of any record kept by the OPG. The OPG must permit said law enforcement personnel...to make copies of business records at the OPG's place of business...." *Id.*

⁷Laserfiche has limited control in that each OPG may view only of its owned scanned documents.

contractor is not subject to the principal's control and is only bound by contract to achieve some result. See Weinberg v. Clark, (1932) 120 Cal.App. 362, 366 ("An independent contractor is one who in rendering service exercises an independent employment or occupation, and represents his employer only as to the results of his work and not as to the means whereby it is to be accomplished").

Petitioner has not met its burden of showing that the City constructively possesses the data in VIIC or at Laserfiche. As stated, the OPGs own the records maintained by OPG-LA and Laserfiche. Pursuant to the OPGs' direction, OPG-LA has granted the City access to the VIIC and Laserfiche databases by providing user names and passwords to LAPD personnel assigned to the Commission Investigation Division ("CID"), which has made only limited use of that access by reviewing VIIC information and conducting financial spot checks of the OPGs by reviewing remittance reports in Laserfiche. Jones Decl., ¶s 9, 10. City personnel do not have authority to modify or change the records, and have no other control over their contents. Jones Decl., ¶9. The City has never accessed all of the data in either the VIIC or Laserfiche. *Id.* CID does not use Laserfiche to retrieve a copy of the CHP 180 because the Laserfiche copy is only the OPG's portion of the form and is almost always illegible. *Id.*

Under these circumstances, the City does not constructively possess the VIIC and Laserfiche data. The key issues are ownership and control. The City has neither. It only has the right to access.

In reply, Petitioner attempts to show the City does have ownership. Petitioner presents a particular City/OPG contract, which provides at page 11 of attachment B as follows:

"PSC-27 Ownership

Unless otherwise provided for herein, all documents, materials, data and reports originated and prepared by **CONTRACTOR/CONSULTANT** [the OPG] under this contract shall be and remain the property of the **CITY** for its use in any manner it deems appropriate...." Reply Cook Decl., Ex.B.⁸

Petitioner argues that the OPGs created the VIIC data and scanned the CHP 180 form into Laserfiche pursuant to their City/OPG contractual obligations to provide timely information to VIIC and participate in a "Document Control System," as set forth in an amendment to the City/OPG contract. Reply Cook Decl., Ex.D (§9.3, 9.4). Petitioner concludes that, since the OPGs created the VIIC data and scanned documents into Laserfiche pursuant to their contracts with the City, then the City owns the records.

The problem with this evidence is that it is made for the first time in reply. Petitioner's theory in her moving papers was that the City has constructive possession of the VIIC and Laserfiche data, making them public records. Therefore, Petitioner was obligated to demonstrate the City's ownership and/or control of the records in her moving papers. New evidence raised for the first time in a reply brief is not properly presented to a trial court and may be disregarded. Regency Outdoor Advertising v. Carolina Lances, Inc., (1995) 31 Cal.App.4th 1323, 1333.

⁸The City has admitted that all OPG contracts have the same recordkeeping requirements. Jones Decl., ¶7.

Petitioner has no excuse for waiting until reply to demonstrate the City's ownership of VIIC and Laserfiche records. Consequently, Petitioner has waived her right to present this evidence.

This conclusion is not merely technical in nature. The City has presented evidence that it does not own or control these records. The contract provision set forth in Exhibit B arguably conflicts with the City's evidence. That provision is part of a standard attachment and states that "[u]nless otherwise provided herein", the City owns the documents and data generated by the OPG "under this contract". This contract language raises at least two issues: (1) Are there other provisions in the City/OPG contract which indicate that the OPG owns the documents it creates, and therefore meet the "unless otherwise provided herein" condition? and (2) Were the Laserfiche scans and VIIC data generated "under" the City/OPG contract, or were they generated pursuant to a separate contract between the OPG and OPG-LA and Laserfiche?⁹

Because Petitioner presented this evidence only in reply, the court cannot reach conclusions about the City's ownership. Therefore, Petitioner has failed to meet her burden of showing constructive possession. As the City argues, Petitioner has not requested City records in private hands, but rather private records which the City does not constructively possess. *See* Opp. at 8.

2. Are the Databases Public Records?

The CPRA defines "public records" to include: "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." §6252(e).¹⁰

The VIIC data on vehicle seizures is created by the OPGs and is electronically stored in a data system managed by third party OPG-LA. If the VIIC data is a public record, the fact that the data is stored electronically does not affect its public record status. *See* §6251(e) (form of writing does not affect public record status).

The City argues that the court should not rely on the literal language in section 6252(e) that the mere "use" of records by a public agency would qualify as "public records." Courts should not "rely too heavily on characterizations such as 'disjunctive' form versus 'conjunctive' form to resolve difficult issues of statutory construction," and instead must "look at all parts of the statute." *See Kelly v. Wauconda Park Dist.*, (7th Cir. 1986) 801 F.2d 269, 270 n.1. The City argues that the overall policy of the CPRA assumes some element of government control over, or ownership of, a requested record. Opp. at 9.

⁹The partial amendment presented by Petitioner (Ex.D) does not answer this question. The original contract appeared to call only for weekly and monthly reports (A.T.S. Northeast Tow Contract, p. 25) and did not require any additional information. The partial amendment added VIIC and Document Control System requirements, but the court cannot evaluate these requirements without the complete amendment.

¹⁰It is undisputed that the CHP 180 form is a "writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by" the City. The CHP 180 form is filled out by an LAPD officer pursuant to a vehicle seizure. It is maintained by the City as part of LAPD's investigative file.

As the City argues, the CPRA was modeled on its federal predecessor, the Freedom of Information Act (5 U.S.C. §552 *et seq.* (“FOIA”)), and the legislative history and judicial construction of FOIA serves “to illuminate the interpretation of its California counterpart.” Times Mirror Co. v. Superior Court, (1991) 53 Cal.3d 1325, 1338 (internal quotations omitted). The United States Supreme Court held that “Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an ‘agency record’ within the meaning of the FOIA.” Forsham v. Harris, (“Forsham”) (1980) 445 U.S. 169, 182 (data possessed by recipient of federal grant was not a public record because it was not created or obtained by agency). The Court rejected the idea that government funding plus a right of government access to the data made them agency records. *Id.* at 171.

As in Forsham, the data within the VIIC and Laserfiche databases are not “public records” under the CPRA. The City has never physically acquired the requested data. It has viewed over the internet VIIC reports, and has used Laserfiche only sporadically to conduct spot checks of OPGs by reviewing their remittance reports. *See* Jones Decl., ¶10. Assuming that an internet viewing is the same as obtaining a record, the vast majority of the electronic records in the VIIC and Laserfiche databases have never been viewed or used by the City. Jones Decl., ¶’s 9, 10. While the City has the right to make copies of the records upon request, it has not done so. Thus, it cannot be said that the City has “obtained” the data for purposes of defining a public record. The right to access a record is not the same as having obtained it.

The VIIC and Laserfiche databases are not public records.

3. Are the Records Exempt?

Pursuant to section 6254.5,¹¹ if a public record would otherwise be exempt, the agency waives any privilege barring disclosure once the public agency discloses the record to “any member of the public.” At that point the agency must produce the record to all who requests it. Black Panther Party v. Kehoe, (“Black Panther”) (1974) 42 Cal.App.3d 645, 655-57.

Petitioner argues that no “official information” or “investigatory records” exemption can apply to the VIIC and Laserfiche databases. The City gave the executed CHP 180 forms to the individual OPGs for entry into the OPG-LA data system. The LAPD also gave a copy of the CHP 180 form to the vehicle’s driver and delivers a copy to the vehicle’s registered owner via mail. Some VIIC information (model, reason for impound, location, and charges) is freely shared between OPG-LA and members of the public who enter a VIN. Cook Decl., ¶8. Petitioner concludes that, assuming the CHP 180 forms and VIIC data otherwise are exempt from disclosure, the City waived any such exemption. Black Panther, *supra*, 42 Cal.App.3d at 356-57.

The City opposes, relying on the fact that the information on its CHP 180 forms differs from the forms in the Laserfiche database, and concluding that the forms are exempt from disclosure (§6254(f)). Opp. at 11. The City also argues that the databases contain OPG financial and tax information and personal identifying information from the impounded car’s

¹¹Section 6254.5 states: “Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law.”

driver which is subject to a privacy privilege (§6254(k)). Finally, the City argues that the burden of producing all data in the VIIC and all of the Laserfiche database would be an undue burden such that the public interest in disclosure is clearly outweighed by the public interest in non-disclosure (§6255). See American Civil Liberties Union Foundation v. Deukmejian, (1982) 32 Cal.3d 440, 452 (expense and inconvenience to public agency must be considered). Opp. at 12.

The City has failed to make an evidentiary showing of the burden of production, what redactions would have to be made, and how to separate the exempt from non-exempt records. The City has the burden to show exemption, and has not met its burden.

F. Analysis of Supplemental Briefs

The court held a hearing on August 12, 2014 and issued the above portion of this tentative ruling denying the petition. The court did not adopt its tentative but instead ordered the parties to meet and confer regarding what information is contained in the VIIC and Laserfiche, and what information is actually being sought. The City also was directed to submit supplemental briefing on (1) ownership and control, (2) privacy, and (3) undue burden by September 23, 2014. Petitioner was directed to file a supplemental reply by October 7, 2014. Both parties' supplemental briefs were timely filed.

Petitioner has clarified that she seeks (1) all VIIC data regarding vehicles seized at the direction of an LAPD officer, and (2) all records scanned by OPGs into Laserfiche pursuant to the OPG's contractual responsibilities with the City.

The issue is ownership and control. As stated *supra*, the standard contract provision PSC-27 Ownership set forth in Exhibit B provides that the City owns documents originated and prepared by the OPG "under" their contract, which conflicts with the City's evidence of non-ownership. The court noted that the provision is part of a standard attachment which states that "[u]nless otherwise provided herein", the City owns the documents and data generated by the OPG "under this contract".

The City first argues that Petitioner's reliance on Articles 9.3 and 9.4 of the OPG contracts to contend that "the OPGs created VIIC data *because* Article 9.3 *required* it, and the OPGs stored CHP 180s in Laserfiche *because* Laserfiche is the "Document Control System" the OPGs *must* use per Article 9.4" is misplaced. Nothing in Article 9.3 requires any OPG to input specific information into VIIC and nothing in Article 9.4 requires any OPG to store specific information on Laserfiche. City Supp. at 1. The court agrees that these provisions require that OPGs provide information to VIIC (§9.3) and maintain a Document Control System (Laserfiche) without requiring specific information to be placed in it.

The City then points out that standard contract provision is not PSC-27 Ownership has been superseded by PSC-23 Ownership and License ("PSC-23"). Jones Decl., ¶s 6, 8. PSC-23 provides:

"Unless otherwise provided for herein, all Work Products originated and prepared by CONTRACTOR or its subcontractors of any tier under this Contract shall be and remain the exclusive property of the CITY for its use in any manner it deems appropriate. Work Products are all works, tangible or, not, treated under this Contract including, without limitation; documents, material, data, reports, manuals,

specifications, artwork, drawings, sketches, computer programs and databases, schematics, photographs, video and audiovisual recordings, sound recordings, marks, logos, graphic designs, notes, websites, domain names, inventions processes, formulas matters and combinations thereof, and all forms of intellectual property. CONTRACTOR hereby assigns, and agrees to assign, all goodwill, copyright, trademark, patent, trade secret and all other intellectual property rights worldwide in any Work Products originated and prepared by CONTRACTOR under this Contract. CONTRACTOR further agrees to execute any documents necessary for the CITY to perfect, memorialize, or record the CITY'S ownership of rights provided herein."

"For all Work Products delivered to the CITY that are not originated or prepared by, CONTRACTOR or its subcontractors of any tier under this Contract, CONTRACTOR hereby grants a non-exclusive perpetual license to use such Work Products for any CITY purposes."

"The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties." Bank of the West v. Superior Court, (1992) 2 Cal.4th 1254, 1264. This mutual intention is determined by objective manifestations of the parties intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated, the object, nature, and subject matter of the contract, and the subsequent conduct of the parties. Morey v. Vannucci, (1998) 64 Cal.App.4th 904, 912. Where the meaning of words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence relevant to show whether the contract is susceptible of the particular meaning. Id. Extrinsic evidence is thus admissible to interpret the language of a written instrument, as long as such evidence is not used to give the instrument a meaning to which it is not reasonably susceptible. Where the interpretation of contractual language turns on a question of the credibility of conflicting extrinsic evidence, any conflict must be resolved by the jury. Id. In general, parties to a commercial transaction are entitled to limit the liability of one to another, or otherwise allocate the risk of doing business. Philippine Airlines, Inc. v. McDonnell Douglas Corp., (1987) 189 Cal.App.3d 234, 237. However, contractual clauses seeking to limit liability are strictly construed and any ambiguity is resolved against the party seeking to limit liability. Id.

The City presents evidence that LAPD, which administers the City's OPG contracts, has always understood that the records generated by the OPGs, including the information stored in the VIIC and Laserfiche, belong exclusively to the tow companies. Jones Decl., ¶'s 2, 9, 13. Each OPG decides what information to input in VIIC and what documents to store in Laserfiche. Id., ¶10's 10-11. LAPD's understanding of the purpose of PSC-23 is for the City to obtain ownership and licensing rights when the contractor is providing goods to the City, and the OPGs provide towing and storage services, not deliverable goods. Id., ¶5. No City representative has ever considered the VIIC and Laserfiche documents as OPG Work Product belonging to the City under section PSC-23. Id., ¶13. Various OPGs confirm that they own these documents. See, e.g., Smart Decl., ¶13.

The OPG contract is susceptible of interpretation in the manner indicated by the City and OPGs. *See* Civ. Code §1639. Article 14.3 is a standard provision in all OPG contracts, and provides for the OPG's retention of VIIC and Laserfiche records, and inspection for purposes of audit (§14.3(b), (c)) and law enforcement (§14.3(d), (e)). PSC-23 is a standard provision tacked on to City contracts and was not created specifically for the OPG contracts. PSC-23 provides ownership of Work Product to the City "unless otherwise provided for" in the OPG contract. Article 14.3 meets the "otherwise provided for" requirement, thereby negating PSC-23 ownership. There is no reason to provide for limited access to City personnel (law enforcement and auditors) of records which are owned by the City. To the extent the City wanted to include a provision for access to documents owned by it, the access would be unfettered, not limited. The interpretation by the parties to the OPG agreement is reasonable.

Moreover, the evidence of the parties' contract performance is compelling evidence of their intent. Petitioner correctly argues that the parties' understanding and self-serving interpretations of a contract term after a dispute has arisen is irrelevant (Southern California Edison v. Superior Court, (1995) 37 Cal.App. 839, 851), and the City presents no evidence of negotiation. But the City's evidence of performance shows that the contract parties have always interpreted their contract as vesting ownership of these documents in the OPGs, not just since this dispute arose, and have acted accordingly. For example, the City has obtained a search warrant when it wanted physical possession of the records stored at Laserfiche, even though Article 14.3(e) gives law enforcement a right of access. *See* Jones Decl., Ex.1. This is powerful evidence that the parties have performed the OPG contracts with the intent that the OPGs own the information in VIIC and Laserfiche.

Petitioner argues that the City's evidence shows that it owns the records because CID personnel retrieved and provided documents from Laserfiche. Pet. Supp. at 5. This is an issue of access, not ownership.¹²

In sum, the OPG contracts must be interpreted consistently with the contract parties' intent. The terms of the contract, and the parties course of performance, demonstrates that the OPGs own the documents in VIIC and Laserfiche and not the City. While the City has access to these documents, it does not control them.¹³

G. Conclusion

Petitioner Flynn has not shown that the records in question (1) qualify as public records, and (2) are in the City's constructive possession. The petition for writ of mandate is denied. The

¹²The City's ownership in PSC-23 only applies to Work Products prepared by an OPG under the OPG contract. Petitioner shows that VIIC and Laserfiche documents are prepared under the contract. Pet. Supp. at 6. Specifically, section 61 requires the OPG tow truck operator to fill out the CHP 180, and section 9.3 requires the OPG to maintain the VIIC system. Section 9.4 requires the OPG to participate in a Document Control System, which is Laserfiche. The documents prepared for those systems are prepared under the OPG contract.

¹³Because of this conclusion, the court need not address the privilege and undue burden issues.

City's counsel is ordered to prepare a proposed judgment, serve it on Petitioner's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for November 20, 2014 at 9:30 a.m.

1 **PROOF OF SERVICE**

2
3 I declare that I am and was at all times herein mentioned over the age of eighteen years
4 and not a party to the action in which this service is made; that at all times herein mentioned I
5 have been employed in the County of Los Angeles and that my business address is 200 No.
6 Main Street, Room 675, CHE, Los Angeles, California 90012.

7 On September 19, 2016, I served the following document(s) described as:

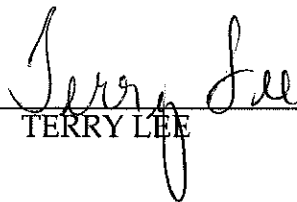
8 **RESPONDENT'S REQUEST FOR JUDICIAL NOTICE IN OPPOSITION**
9 **TO PETITION FOR WRIT OF MANDATE**

10 [X] **BY U.S. MAIL** – placed the envelope for collection and mailing, following our ordinary
11 business practices. I am readily familiar with this business' practice for collecting and
12 processing correspondence for mailing. On the same day that correspondence is
13 placed for collection and mailing. It is deposited in the ordinary course of business
14 with the United States Postal Service, in a sealed envelope with postage fully prepaid
addressed as follows:

15 **Donald W. Cook, Esq.**
16 **3435 Wilshire Boulevard, Suite 2910**
17 **Los Angeles, CA 90010**

18 I declare under penalty of perjury under the laws of the State of California that
19 the foregoing is true and correct.

20 Executed on September 19, 2016, at Los Angeles, California.

21
22
23
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27
28

TERRY LEE